Supreme Court, U.S.
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No. _____

In The

# Supreme Court of the United States

ROBERT GREMMINGER,

*Petitioner,*

vs.

THE STATE OF CALIFORNIA,

*Respondent.*

**On Petition For Writ Of Certiorari To The California Court Of Appeal, Sixth Appellate District**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In an involuntary manslaughter prosecution based on the commission of a misdemeanor (so-called, "misdemeanor-manslaughter"), does a trial court's failure to identify for the jury any predicate misdemeanor, or define any of its essential elements, deprive a defendant of the Sixth Amendment right to jury trial?

TABLE OF CONTENTS

Page

QUESTION PRESENTED ..... i

TABLE OF AUTHORITIES ..... iii

PETITION FOR WRIT OF CERTIORARI ..... 1

OPINION BELOW ..... 1

JURISDICTION ..... 1

CONSTITUTIONAL PROVISION INVOLVED ..... 2

STATEMENT OF THE CASE ..... 2

REASONS FOR GRANTING THE WRIT ..... 5

CONCLUSION ..... 10

# TABLE OF AUTHORITIES

Page

## Federal Cases

*Chapman v. California*, 386 U.S. 18 (1967) ..... 7

*Harris v. Oklahoma*, 433 U.S. 682 (1977) ..... 8

*Schad v. Arizona*, 501 U.S. 624 (1991) ..... 9

*United States v. Bagaric*, 706 F.2d 42 (2d Cir. 1983) ..... 9

*United States v. Canino*, 949 F.2d 928 (7th Cir. 1991) ..... 8

*United States v. Carillo*, 229 F.3d 177 (2d Cir. 1999) ..... 8

*United States v. Dixon*, 509 U.S. 688 (1993) ..... 7, 8

*United States v. Etchiverri*, 854 F.2d 638 (3d Cir. 1988) ..... 8

*United States v. Guiton*, 515 U.S. 506 (1995) ..... 6

*United States v. Miller*, 116 F.3d 641 (2d Cir. 1997) ..... 9

*Whalen v. United States*, 445 U.S. 684 (1980) ..... 8

*In re Winship*, 397 U.S. 358 (1967) ..... 6

## State Cases

*People v. Massie*, 19 Cal. 4th 550 (1998) ..... 8

*People v. Prettyman*, 14 Cal. 4th 248 (1996) ..... 10

*People v. Williams*, 13 Cal. 3d at 559 ..... 7

*State v. Adams*, 242 Kan. 20 (1987) ..... 7

*State v. Beinlein*, 1987 Ohio LEXIS 8636 (Ohio App. 1987) ..... 7

*State v. Burnett*, 1993 Ohio LEXIS 2498 (Ohio App. 1993) ..... 7

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

18 U.S.C. § 1952 ..... 5, 6

18 U.S.C. § 1961(1) ..... 6

18 U.S.C. 1961-1968 ..... 6

21 U.S.C. § 848 ..... 5, 8

21 U.S.C. § 848(c)(1) ..... 6

28 U.S.C. § 1257(a) ..... 1

STATE STATUTES

Cal. Penal Code § 192 ..... 4

Cal. Rules of Court 24(a) ..... 1

OTHER AUTHORITY

Eric S. Miller, Note, "Complex-Complex Criminal Statutes and the Constitution: Demanding Unanimity as to Predicate Acts," 104 Yale L.J. 2277 (1995) ..... 5

## PETITION FOR WRIT OF CERTIORARI

Petitioner, Robert Gremminger, respectfully prays that a Writ of Certiorari issue to review the judgment and decision of the California Court of Appeal, Sixth Appellate District.

## OPINION BELOW

The unreported opinion of the California Court of Appeal, Sixth Appellate District (App., 1), was filed on December 20, 2000. The California Supreme Court denied review of that decision on March 23, 2001.

## JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) on the ground that petitioner's rights under the Sixth Amendment to the United States Constitution were violated in the trial leading to his conviction. In its opinion filed December 20, 2000, the California Court of Appeal rejected petitioner's constitutional claims. Upon denial of review by the California Supreme Court, that judgment became final. *See* Cal. Rules of Court 24(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a . . . trial, by an impartial jury. . . . "

## STATEMENT OF THE CASE

Petitioner was charged with the murder of Anthony Gilbert at a mall in Milpitas, California on October 24, 1997. Petitioner, a captain of the San Jose Fire Department, was making an off-duty visit to the mall. As he walked from his car toward the shops, he noticed two men with a shopping bag run towards a Pontiac, urging the driver to "start it up." He then saw a security vehicle pull up behind the Pontiac, blocking it in.

The security guard ordered the occupants out of the car. The driver got out and confronted the guard in a threatening manner. With a sense of urgency, the guard called for "a Code 3 fill," which indicates that an officer is in emergency need of assistance. Gilbert, who had several warrants out for his arrest, slid over into the driver's seat and backed the car towards the guard, ramming his security vehicle. The guard unsuccessfully attempted to pull the driver out of the car. Gilbert then drove the Pontiac forward, ramming a car parked in front of it. A second security guard responded to the emergency. He, too, felt greatly endangered as Gilbert began to drive forward towards him at about 10 miles per hour. He took cover behind another parked car.

Petitioner, who had witnessed the altercation, believed the security guards were in danger. He had noticed that Gilbert (whom he had seen running to the car) had slid over into the driver's seat. Within a few seconds, he saw Gilbert reach underneath the seat of the vehicle. Petitioner believed "that he was going for a weapon and that this situation was getting out of control." Petitioner then realized that his own car was a short distance away and that he had a firearm in the car. Petitioner walked to his car and retrieved the weapon. The gun had been his off-duty firearm when he was a police officer in 1967. He had not fired it since that time, and the ammunition in the gun was 30 years old. Mr. Gremminger explained that he believed "there was a life threatening situation evolving." He intended to put the weapon in his pocket and "proceed and lend assistance to the security guard who at the time was outmanned."

While he was at his car, Mr. Gremminger heard "some commotion" and thumping noises which led him to believe that the security guard was being attacked. Petitioner ran toward the altercation. As he ran past a parked car, he expected to see the security guard under assault. Instead, he "turned and saw a vehicle about 15 feet away from me, heading directly at me." Petitioner believed he was about to get run over by a car. He "instinctively pulled my gun and shot." He believed he could not simply step out of the way because "[t]he car was almost upon me. It was moving fast enough where I would not have been able to move." "This all happened in one and a half seconds or less, it was very fast." (RT

942.) Investigating officers located stolen merchandise in the trunk of the car and 24 rocks of crack cocaine under the front seat. A test of Gilbert's blood disclosed that he was under the influence of cocaine.

In instructing the jury on the crime of involuntary "misdemeanor-manslaughter,"[1] the court failed to identify any misdemeanor shown by the evidence and failed to define any essential elements of any misdemeanor. The jury acquitted petitioner of murder and voluntary manslaughter, but convicted him of involuntary manslaughter. The trial court sentenced petitioner to nine years in state prison.

Petitioner sought reversal, *inter alia*, on the ground that the trial court deprived him of his Sixth Amendment right to jury trial by submitting the case to the jury on the theory of misdemeanor-manslaughter without identifying or defining the elements of any misdemeanor shown by the evidence. The California Court of Appeal ruled that the trial court erred by failing to instruct on the elements of a misdemeanor, but concluded that the error was

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[1] Under California law, misdemeanor manslaughter is a variant of involuntary manslaughter. Cal. Penal Code § 192. That statute provides that manslaughter is the "unlawful killing of a human being without malice." It further provides that manslaughter is involuntary where it is done "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." The offense is sometimes referred to as "unlawful-act manslaughter" since it can be committed in the commission of an non-felonious unlawful act, including a misdemeanor or an infraction.

merely one of state law since, under the Sixth Amendment, the misdemeanor elements are not essential elements of the offense of involuntary manslaughter. (App., 24, 27.)

Petitioner now seeks a petition for writ of certiorari to the California Court of Appeal.

## REASONS FOR GRANTING THE WRIT

### THE COURT SHOULD GRANT THE WRIT TO RESOLVE A SPLIT OF AUTHORITY ON THE IMPORTANT AND RECURRING QUESTION OF WHETHER THE SIXTH AMENDMENT GUARANTEES THE RIGHT TO JURY TRIAL ON THE ELEMENTS OF A "PREDICATE" OFFENSE

#### A. The Problem Created By Compound Criminal Statutes

A compound criminal statute is one that requires for its proof certain elements, plus the proof that the defendant committed some other "predicate" criminal offense. *See* Eric S. Miller, Note, "Complex-Complex Criminal Statutes and the Constitution: Demanding Unanimity as to Predicate Acts," 104 Yale L.J. 2277, 2280 (1995). Common law examples include felony-murder, which requires proof of a killing in the course of committing some statutorily enumerated, or inherently dangerous, felony, and misdemeanor-manslaughter, which requires proof of a killing in the course of a misdemeanor. Modern criminal codes have introduced many compound crimes. *See, e.g.*, 18 U.S.C. § 1952 (The Travel Act); 21 U.S.C. § 848 (the Continuing Criminal Enterprise ("CCE") statute); and the

18 U.S.C. 1961-1968 (Racketeer Influenced and Corrupt Organizations ("RICO") statute).[2]

The question presented in the instant case is whether a defendant charged with a compound offense, in this case misdemeanor-manslaughter, enjoys a Sixth Amendment right to jury trial as to the predicate offense. Put otherwise, is the predicate offense an essential element of the compound offense? And put more specifically, are the essential elements of the predicate offense also essential elements of the compound offense?

The ramifications of the question are significant. The Sixth Amendment guarantees the defendant the right to "have the jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *United States v. Guiton*, 515 U.S. 506, 522-523 (1995); *In re Winship*, 397 U.S. 358 (1967). Here, if the predicate misdemeanor is an element of the compound offense of misdemeanor-manslaughter, the trial court would have been obligated to instruct the jury on each predicate misdemeanor shown by the evidence and to define its elements. The failure to so instruct the jury would constitute federal constitutional error and would

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[2] The Travel Act requires proof that the defendant traveled interstate with intent to commit enumerated criminal violations. 18 U.S.C. § 1952(a). The CCE requires proof that the defendant engaged in a "continuing criminal enterprise," defined as any felony offense appearing in subchapter II of Title 21, Chapter 13, commencing with § 951. 21 U.S.C. § 848(c)(1). These offenses include virtually any illegal drug-related activity. RICO requires proof of racketeering activity defined as violations of nine major categories of state crimes and 35 different federal offenses. 18 U.S.C. § 1961(1).

be subject to review for harmlessness under *Chapman v. California*, 386 U.S. 18 (1967).

The California court in the instant case held that, in a misdemeanor-manslaughter prosecution, the predicate misdemeanor was *not* an element of involuntary manslaughter and thus there was no Sixth Amendment right to jury trial with respect to it. App., 27. Accordingly, the trial court had no federal constitutional obligation to inform the jury of the misdemeanor that could support a manslaughter verdict or advise the jury of its elements. The California Court of Appeal relied for this grudging view of the Sixth Amendment on a California Supreme Court decision which held that instruction on the underlying misdemeanor was necessary, not as a matter of constitutional law, but only to prevent the jury from engaging in "unguided speculation." *People v. Williams*, 13 Cal.3d at 559, 563 (1975).

Other states have taken a different approach, holding that the elements of the underlying misdemeanors are in fact elements of misdemeanor-manslaughter. *See State v. Adams*, 242 Kan. 20, 24 (1987) (state must prove elements of underlying misdemeanor); *State v. Burnett*, 1993 Ohio LEXIS 2498 (Ohio App. 1993); *State v. Beinlein*, 1987 Ohio LEXIS 8636 (Ohio App. 1987).

There is every reason to believe that the California courts have misconstrued the scope of the Sixth Amendment guarantee. In the perfectly analogous context of a felony-murder prosecution, it is universally agreed that the elements of the underlying felony are essential elements of felony-murder and the jury must be so instructed. *United States v. Dixon*, 509 U.S. 688, 698

(1993);[3] *Whalen v. United States*, 445 U.S. 684, 694 ("proof of a rape is a necessary element of proof of the felony-murder") (1980); *Harris v. Oklahoma*, 433 U.S. 682 (1977) [essential elements of felony-murder incorporate the statutory elements of the underlying felony]. *Accord, People v. Massie*, 19 Cal.4th 550, 573 (1998) [to prove felony-murder, prosecution must prove elements of underlying felony].

Outside of the offense of felony-murder, however, there is little agreement on whether a predicate offense is an element of the compound offense. Thus, in the context of the CCE statute, 21 U.S.C. § 848, the courts are divided on the question. *Compare United States v. Etchiverri*, 854 F.2d 638, 643 (3d Cir. 1988) (in CCE prosecution, predicate offenses are essential elements) *with United States v. Canino*, 949 F.2d 928 (7th Cir. 1991), *cert. denied*, 504 U.S. 910 (1992) (in CCE prosecution, predicate offenses are not elements but merely means of fulfilling continuing series element of offense). Similarly, in the context of RICO prosecutions, there is no agreement on the question whether the elements of the predicate acts are elements of the RICO charge. *Compare United States v. Carillo*, 229 F.3d

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[3] As Chief Justice Rehnquist explained in *Dixon*, "In *Harris*, we held that a conviction for felony murder based on a killing in the course of an armed robbery foreclosed a subsequent prosecution for robbery with a firearm. Though the felony murder statute in *Harris* did not require proof of armed robbery, it did include as an element proof that the defendant was engaged in the commission of *some* felony. [Citation.] We construed this generic reference to some felony as incorporating the statutory elements of the various felonies upon which a felony-murder conviction could rest." (*United States* v. *Dixon*, *supra*, 509 U.S. at p. 717 [conc. and diss. opn.].)

177, 182 (2d Cir. 1999) (elements of predicate acts are elements of RICO and jury must be instructed on them); *United States v. Bagaric*, 706 F.2d 42, 62 (2d Cir. 1983) (all elements of predicate state law violations need not be described as long as court gives "accurate generic definitions"); *United States v. Miller*, 116 F.3d 641, 675 (2d Cir. 1997) ("RICO's allusion to state crimes was not intended to incorporate elements of state crimes. . . . ").

The foregoing conflicts have developed largely because of the ambiguity of test for determining what the essential elements of an offense are. As this court explained in *Schad v. Arizona*, 501 U.S. 624 (1991), jurors must be instructed on those facts that are "material" or "necessary to constitute the crime." *Id.* at 638. *Schad* noted, however, that there is a critical distinction between essential elements and "mere alternative means" of fulfilling the essential elements. As to the latter, there is no right to jury trial. *Id.* at 631-632. A plurality of the court observed in *Schad* that the definition of the elements of an offense are, in the first instance, left to the legislature. *Id.* at 638. Beyond this general formulation, there is little specificity as to how the lower courts are to determine which facts must be proven beyond a reasonable doubt and which do not. Indeed, the *Schad* plurality candidly admitted its "inability to lay down any 'bright line' test," and thus observed that "the state legislature's definition of the elements of the offense is usually dispositive." *Id.* at 639, *quoting McMillan v. Pennsylvania*, 477 U.S. at 79, 85, 91 (1986). There are, however, "obviously constitutional limits beyond which the States may not go." *Id., citing, Patterson v. New York*, 432 U.S. 197, 210, and *McMillan, supra*, at 86.

This court's previous pronouncements in felony-murder cases – holding that the proof of the underlying felony is an element of felony-murder – defines just such a "constitutional limit" on the state's power to withdraw certain elemental facts from the jury's consideration. In both instances, the state has expressly premised criminal liability on the proof of another offense. These cases plainly require that similar complex offenses, such as misdemeanor-manslaughter, be interpreted similarly.

The failure of the trial court in petitioner's case to identify for the jury any misdemeanor petitioner supposedly committed, or to instruct the jury on the elements of the predicate misdemeanor, deprived him of the Sixth Amendment right to jury trial. For all we know, petitioner's jury, unguided by such instructions, may have convicted petitioner of a serious felony based solely on a belief that he engaged in some "unspecified nefarious conduct." *People v. Prettyman*, 14 Cal.4th 248, 268 (1996). The Sixth Amendment requires more.

## CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Dated: June 15, 2001

Respectfully submitted,

LAWRENCE A. GIBBS
*Attorney for Petitioner*

# APPENDIX

## OPINION OF THE COURT OF APPEAL FILED DECEMBER 20, 2000

**NOT TO BE PUBLISHED**

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

| | |
|---|---|
| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>ROBERT GREMMINGER,<br>Defendant and Appellant. | H018156<br>(Santa Clara County<br>Super. Ct. No. 192648)<br>(FILED DEC 20, 2000) |

On October 24, 1996, defendant Robert Gremminger, an off-duty San Jose fire fighter, shot and killed Anthony Gilbert in the parking lot of the Great Mall in Milpitas. Defendant fired a single shot from approximately 14 feet away that struck Gilbert in the head as Gilbert was seated in the driver's seat of his car. Much of the incident was captured on video tape by the mall's security cameras. The cameras had monitored Gilbert from the time he entered the mall, and they focused upon him as he left because he was suspected of shoplifting items from a store. The cameras also recorded defendant as he went to his car and retrieved his weapon. However, defendant was out of the camera's view when he fired the fatal shot.

Defendant was charged by information with murder (Pen. Code, § 187).[1] The information also alleged that

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[1] All further statutory references are to the Penal Code unless otherwise specified.

defendant personally discharged a firearm at an occupied motor vehicle (§ 12022.5, subd. (b)(1)). A jury convicted defendant of involuntary manslaughter (§ 192, subd. (b)), a lesser included offense of murder, and it found the firearm enhancement to be true. After denying a motion for new trial, the trial court sentenced defendant to nine years in state prison. On appeal defendant contends his conviction should be reversed because the trial court (1) "failed to instruct the jury as to which specific misdemeanor could support an involuntary manslaughter verdict, and failed to instruct the jury on the elements of that misdemeanor offense" and (2) "erroneously excluded evidence that [the victim] was under the influence of crack cocaine and that he had 24 rocks of crack cocaine under the front seat of the Pontiac." (Emphasis and capitalization omitted.) Defendant also claims the sentence enhancement of six years for violation of section 12022.5, subdivision (b) must be reversed because the trial court erroneously instructed the jury on an enhancement based upon section 12022.5, subdivision (a), which does not contain essential elements of the enhancement under section 12022.5, subdivision (b). He further claims that, assuming the enhancement allegation must be reversed, he is not presumptively ineligible for probation so the trial court must evaluate his probation application under the correct standard. Lastly, defendant contends his sentence should be vacated and his case remanded for a new sentencing hearing because the trial court erroneously admitted confidential peace officer information in violation of Evidence Code sections 1043 and 1045.

## FACTS

At approximately 11:00 a.m. on October 24, 1996, Gary Petrakovitz, a security guard supervisor at the Milpitas Great Mall, was patrolling its parking lot when he noticed a black Pontiac make an abrupt sharp turn in an apparent response to its driver having seen the security vehicle. Petrakovitz advised the dispatcher to monitor its actions on security cameras[2] and then followed the Pontiac in a surveillance posture.

Eventually, the Pontiac pulled into a parking space. Two Black male occupants left the car and headed towards a clothing store in the mall. One of the men, Anthony Gilbert, disappeared inside the store; several moments later, he reappeared on surveillance cameras with a bag full of clothes. Mall security confirmed Gilbert had not made a purchase and informed Petrakovitz that Gilbert was suspected of stealing the merchandise.

Once outside the mall, Gilbert ran toward the Pontiac and entered it. As the Pontiac was about to back out of the parking stall, Petrakovitz pulled his security vehicle behind it, partially blocking its way; as the guard pulled up, the Pontiac had its brake and back lights on. During this time, Petrakovitz requested a "code 3 fill," i.e., immediate backup.

Petrakovitz loudly told the car's occupants to " 'step out of the car.' " The driver left the car, approached

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[2] The security camera video, including several enhanced versions, was admitted at trial and repeatedly shown to the jury. Pursuant to defendant's request, this court has viewed the security camera video.

Petrakovitz, and asked "what was going on." Petrakovitz asked the driver "What [was] going on?" and then asked, "Do you have anything you shouldn't have?" The driver said he did not. The two spoke for a few moments while Petrakovitz awaited backup. Initially, the situation was somewhat confrontational, with the driver talking, raising his arms laterally, and moving towards Petrakovitz each time Petrakovitz stepped back. However, the driver's "demeanor seemed to be calm" to the extent that Petrakovitz was able to request the code 3 urgent backup be changed to "code 4," i.e., backup requested on a non-urgent basis.

As Petrakovitz pulled behind the Pontiac, defendant was walking by on his way to the mall. Believing the guard was trying to block the Pontiac and wanting to see what was going on out of "curiosity," defendant turned away from the mall towards the Pontiac and security vehicle. He watched the situation as it began to unfold; at some point, he stood in front of the Pontiac for several seconds, watching the two males in the front face each other in animated conversation. As defendant watched Petrakovitz's interaction with the driver, he thought the driver's behavior was "very threatening." Defendant then saw the passenger move to the driver's seat and twice reach underneath the car seat. Believing the individual was "going for a weapon and this situation was getting out of control," defendant walked back to his own vehicle to retrieve his gun from his car.

In the interim, Gilbert, who had entered the Pontiac on its passenger side and later had slid into the driver's seat, put the car in reverse and slowly backed into Petrakovitz's security vehicle.

After defendant reached down into his vehicle and retrieved a .38-caliber revolver, he heard raised voices and a "thump" "like something against metal." Defendant testified that he put the revolver into his pocket and then returned towards the scene, concealing himself from the Pontiac by standing behind a white Voyager minivan parked adjacent to the Fontiac's driver side.

As defendant walked behind the minivan, Gilbert began maneuvering the Pontiac in the parking space, apparently trying to steer the car out of the stall. After backing into the security vehicle, he moved forward and bumped a BMW parked in front of him. He then turned the wheel and backed into a Toyota Camry abutting the Pontiac's stall on the driver's side.

As Gilbert began maneuvering the Pontiac, Petrakovitz ended his conversation with the original driver, opened the driver's side door, and asked Gilbert to get out; the door was pulled out of Petrakovitz's hand, shut, and locked. The car backed up, and Petrakovitz moved backwards, out of the way. Trying to steer out of the stall, Gilbert put the car into reverse, apparently trying to escape between the rear of the Camry and the front of Petrakovitz's vehicle. At this point, Petrakovitz advised security guard Jonas Ranoa, who just had arrived on the scene, to "just back off, forget it, let [him] go."

Gilbert made one more trip forward in an apparent effort to gain clearance of the two vehicles. He went forward with the wheel turned hard to the left, and hit the Voyager minivan shielding defendant. As Gilbert put the Pontiac in reverse and began his final retreat between

the rear of the Camry and the front of the security vehicle, defendant pulled out the revolver and fired a single shot into the front windshield of the Pontiac. The bullet struck Gilbert in the left temple area, killing him.

Immediately after the shooting, Petrakovitz walked to defendant and asked if he was a police officer. Defendant replied, "No, I'm a San Jose Fire Fighter." Petrakovitz then asked if defendant he had a "CCW," i.e., "a permit to carry a concealed firearm." When defendant said he did not, Petrakovitz asked him to place the gun in the security vehicle. Defendant complied.

Observing the bullet hole in the windshield and the victim's head tilted upwards, Petrakovitz called for emergency assistance and then went to render aid. Defendant never approached the Pontiac or mentioned having the ability to provide first aid.

Immediately after the shooting, the Camry owner overheard a security guard say, "You didn't have to shoot him." Security guard Ranoa, who responded to the backup request, was standing near defendant after the shooting. When Ranoa asked why defendant had fired the shot, defendant replied, " 'You guys are in danger, that's why.' "

Defendant was arrested. At the police station, he agreed to speak with Sergeant Icely, the lead investigator of the shooting. Defendant, who was "visibly upset" at the time, explained he had suspended his trip to the mall because he was "curious" and "there appeared to be a crime in progress." He admitted he "didn't have the slightest" idea what "was going on." He also admitted he ran towards the Pontiac, cocked his weapon, pointed the

gun at the Pontiac's front window, and shot as the car was moving towards him "very slowly," at approximately "one mile an hour." Defendant said he fired because the Pontiac was heading right at him and at the security guard. He said his shot was "reactionary," that he did not have time to analyze the situation, but added that he did have time to "hesitate" before shooting "so [the driver] could see [him]" and possibly swerve out of the way. He admitted he did not know how many people were in the car, that he "shouldn't have been there," and that he should have "shot the radiator." In the end, defendant wished he had not shot the victim; he said he "should have just stood there and let the guy go."

At trial, defendant testified in his own behalf as follows. He said that when he went to his car and retrieved his weapon after he saw Gilbert twice reach under his seat, he thought "there was a life threatening situation evolving" and he intended to pocket his weapon and return to lend assistance to the "outmanned" security guard. Fearing Gilbert may have armed himself while reaching beneath his seat, defendant used the minivan as a shield as he headed towards Petrakovitz to provide backup. Defendant said he did not alert Petrakovitz to his presence because he feared the driver might use the distraction to strike a blow at the guard. While behind the minivan, defendant heard "thumping noises" and thought the guard was under physical attack. As he emerged from cover, defendant saw the Pontiac about 15 feet from him, "heading directly at [him]." He thought he "was going to get hit" and "instinctively pulled [his] gun and shot [Gilbert]." When asked why he shot, defendant repeated, "It was instinctive. I didn't think about it." He

added that he had fired "[t]o stop the car from hitting [him]."

On cross-examination, defendant admitted that, when he retrieved his weapon, he did not feel in imminent danger and did not feel Gilbert or the Pontiac's first driver was a threat to him. He suspected a theft but was unsure of the circumstances; he relied upon his life experience, including his prior work as a police officer. Defendant testified he never noticed the arrival of security guard Ranoa. Contrary to other post-incident statements, he said he was unaware of Ranoa's presence until after the shooting. He did not recall when he cocked the gun but said he did so by "automatic instinct" because he "felt danger." He claimed he did not consciously aim at anything but fired instinctively and reactively without hesitating to give the driver time to see him. Acknowledging it is dangerous to shoot in a crowded mall lot as a bullet could ricochet and hurt an innocent person, defendant said he "was sure where [his] bullet was going to go." Though he could not see the driver, he claimed he "intentionally" shot "into the position where the driver would have been." Though the bullet found its intended target, defendant testified he was hoping the driver "had ducked" or that he "had missed him."

Just before Petrakovitz heard the gun shot, he heard a double bump he associated with the Pontiac hitting the Voyager. According to Petrakovitz, the car stopped moving and just rocked in place a bit.

Forensic expert testimony and evidence at the scene showed that defendant fired the bullet while approximately 8 to 14 feet from the Pontiac's windshield; that,

judging by the speed of the cars, he had had between 1.8 and 2.8 seconds to jump out of the way had the Pontiac been driven in his direction; that the Pontiac reached a top speed of less than 5 miles per hour during the incident; that the bullet entered the windshield at an angle of approximately 7 to 16 degrees off of center and struck Gilbert in the left side of the forehead and then went across the head rather than from front to back; and that Gilbert's leg was so firmly planted on the brake pedal it had to be pried off. Petrakovitz testified that, in his opinion, there was "no way" the Pontiac could have cleared the minivan and made a sharp enough turn to have driven between the security vehicles so as to possibly strike defendant at the time defendant fired the fatal shot, while security guard Ranoa testified that he believed the Pontiac could have cleared the opening.

## DISCUSSION

### Exclusion of Cocaine-Related Evidence Concerning the Victim's Character

Defendant contends the trial court erred by excluding evidence that, when Gilbert was shot, he had cocaine metabolites in his system and there were 24 rocks of crack cocaine found underneath the driver's seat of the car he was driving.

Defendant sought to introduce the excluded evidence pursuant to Evidence Code section 1103, which permits evidence of a character trait of the victim of a crime to be introduced to prove conduct of the victim in conformity with that trait. However, such evidence, even if relevant, can be excluded pursuant to Evidence Code section 352 if

its probative value is substantially outweighed by its potential for prejudice. Defendant argued to the trial court that the cocaine evidence would show that crack cocaine makes one "violent" and "apprehensive," that crack cocaine was found in the Pontiac, and that Gilbert had ingested cocaine "24 to 36 hours before he died" and had "cocaine metabolites in his system" at that time. The defense argument implied that Gilbert was acting irrationally and aggressively due to his cocaine use and that, therefore, defendant was more justified in shooting him. Immediately after both parties argued the effect of Evidence Code sections 1103 and 352 upon the admissibility of evidence of the cocaine in the car and in Gilbert's system, the trial court applied the balancing test of Evidence Code 352 in finding the proffered cocaine-related evidence inadmissible.[3]

A trial court is vested with wide discretion in determining the admissibility of evidence, and its exercise of discretion under Evidence Code section 352 will not be disturbed on appeal absent a clear abuse (*People v. Cudjo* (1993) 6 Cal.4th 585, 609), i.e, "only if the court exceeds the bounds of reason, all of the circumstances being considered." (*People v. Stewart* (1985) 171 Cal.App.3d 59, 65.) Even if a trial court errs in excluding evidence, reversal is required only if the error results in a miscarriage of

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[3] By contrast, the trial court agreed to admit, pursuant to Evidence Code section 1103, evidence of the victim's two prior thefts and his prior resisting arrest, his no-bail warrant, a $10,000 bail warrant from Santa Clara County, and evidence of the property allegedly taken from the Old Navy store. The court made these evidentiary rulings after balancing the probative value of such evidence against its potential for prejudice.

justice. (Cal. Const. art. VI, § 13.) Such a miscarriage of justice exists only if the reviewing court finds it reasonably probable a result more favorable to the defendant would have been reached in the absence of the error. (*People v. McDonald* (1984) 37 Cal.3d 351, 376, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 942; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Although the defense was premised on the notion that the shooting was justified because the Pontiac was heading at defendant and he acted in the actual and reasonable belief in the need for self-defense, given the facts of this case, the proffered cocaine evidence was virtually irrelevant to any material issue before the jury. While the character evidence of Gilbert's alleged use and possession of cocaine was allegedly offered to show he was acting aggressively, irrationally or desperately, nothing suggested that defendant was aware of any such abberant behavior by Gilbert at the time defendant fired the fatal shot. To the contrary, defendant testified he could not see Gilbert at that time and that he never saw the car Gilbert was driving move until he believed it was being driven in his direction at a slow rate of speed.

Defendant's reliance upon the fact that security guard Ranoa testified Gilbert stared at him and appeared ready to run Ranoa over is misplaced. Gilbert's cocaine use and the presence of cocaine in the Pontiac only could become relevant in defendant's trial if there was evidence which suggested defendant himself had noticed something in Gilbert's demeanor or actions which led him to believe Gilbert was acting unusually irrationally or aggressively at the time of the shooting. However, defendant testified he did not have time to think or analyze the

situation and that he could not see Gilbert due to the glare coming from the windshield. Given defendant could not and did not assess Gilbert's personality before firing his gun and given nothing in Gibert's driving which defendant witnessed suggested defendant was driving under the influence of a drug, there was no reason to admit the proferred cocaine evidence.

We are unpersuaded by defendant's claim that "[h]ad the trial court applied the reasoning used in [*People v.*] Wright [(1985) 39 Cal.3d 576] to [his] case, it would have admitted the evidence of Gilbert's cocaine intoxication." To the contrary, we find *Wright* distinguishable on its facts. In *Wright*, the defendant and victim were involved in a series of face-to-face altercations, during which the defendant shot the victim four times. The defendant claimed to have fired in self-defense, arguing that the victim acted irrationally and aggressively and that he thought the victim had armed himself. The trial court excluded proffered evidence that the victim was under the influence of heroin at the time and previously had acted violently while under the influence of the narcotic on the basis that the evidence was substantially more prejudicial than probative. However, the trial court did not sufficiently place on the record its determination, and, in conjunction with the potentially probative value of the evidence and the lack of explanation of prejudice on the part of the State, our state Supreme Court held it was error to exclude the evidence which it found relevant both to corroborate the defendant's testimony regarding the need for self-defense and to impeach the testimony of a prosecution witness who had testified that the victim had not used narcotics during the 24 hours prior to his

death. (*Id.*, at pp. 583-584.) The *Wright* court noted that the prejudice referred to in Evidence Code section 352 " 'applies to evidence which uniquely tends to evoke an emotional bias against . . . [one party] as an individual and which has very little effect on the issues.' [Citation.]" and that "the balancing process mandated by [Evidence Code] section 352 requires 'consideration of the relationship between the evidence and the relevant inferences to be drawn from it, whether the evidence is relevant to the main or only a collateral issue, and the necessity of the evidence to the proponent's case as well as the reasons recited in [Evidence Code] section 352 for exclusion.' [Citation.]" (*Id.*, at p. 585.) While ordinarily the demeanor of a victim would be relevant in a self-defense case *(ibid.)*, and evidence showing the victim's aggressiveness or lack thereof would be probative of a relevant issue and therefore potentially admissible under Evidence Code section 352, the facts of the instant case are unique in that, unlike the typical self-defense case and unlike the facts in Wright, there was no face-to-face altercation. Defendant never observed the demeanor of victim Gilbert. Defendant testified he only saw the glare of the Pontiac's front windshield at the time of the shooting, and there was no evidence defendant ever saw Gilbert act irrationally or aggressively. Although defendant earlier allegedly had seen Gilbert speak animatedly with the original driver, reach below the seat, and switch seats, defendant did not see Gilbert after defendant left the scene to retrieve his weapon and never indicated that he saw any action which could be construed as attributable to drug use. Defendant similarly could not infer aggressiveness or irrationality from the actions of the car given he testified

he did not even know the car was moving until seconds before he fired. He claimed he never saw the Pontiac "ramm[ing]" into the other cars because he was shielded by the minivan and that, instead, he only heard sounds which suggested to him a scuffle between the security guard and the original driver. In light of the unique facts of this case, any probative value of the proferred evidence bore little or no relationship to the issues before the jury.

On the other hand, the evidence was highly prejudicial from a standpoint of maligning Gilbert's character. While the jury properly learned that Gilbert was a suspected shoplifter, there was no reason for it to learn that Gilbert had used cocaine and possibly was in possession of crack cocaine where nothing had suggested to defendant that Gilbert was acting as an aggressive drug user at the time of the shooting.

Defendant's offer of proof that crack cocaine makes one violent did not make the proffered evidence more probative here, where defendant was not involved in a face-to-face altercation with his victim, where he had no knowledge of any particular traits of character of the victim at the time of the shooting, and where he had no ability to know whether the victim was under the influence of cocaine. Given such factors were not a part of defendant's decision to fire the fatal shot, the fact the victim may have been under the influence of an illegal substance was irrelevant.

The trial court was entitled to exclude the proffered cocaine evidence on the ground that the negative character trait of the victim, namely that he was a drug user and

dealer, was not relevant to the determination of defendant's sole defense of self-defense or on the ground that the small probative value of such evidence was substantially outweighed by its large potential for prejudice.

We summarily note that defendant has cited numerous non-precedential cases in which furtive gestures have validated a police officer's decision to conduct a search. Defendant's reference to himself as a police officer is questionable, at best, given the evidence showed he was last so employed over 30 years before this incident. In any event, any furtive gestures which occurred other than at the time of the shooting were irrelevant. Defendant had no authority to detain Gilbert, and the fact he may have seen allegedly furtive gestures did not authorize or justify him to shoot and kill the victim. In any event, the jury did learn from the testimony of Steven Petrakovitz that, although he had not found a weapon under the front seat of the car Gilbert was driving, "other items" had been found under that front seat and that those items had been seized by Petrakovitz as part of the criminal investigation in this case.

For the reasons stated above, we conclude the trial court did not abuse its discretion when it excluded the proferred cocaine evidence.[4]

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[4] On appeal, defendant additionally has claimed the proffered cocaine-related evidence was admissible to rebut the prosecution theory that Gilbert acted cooperatively, considerately and did not in any way threaten any person on the scene. However, as the People correctly note, there was no question Gilbert was uncooperative while trying to escape the scene and neither the testimony nor the security camera video

In any event, assuming arguendo the trial court erred by refusing the proferred cocaine-related evidence, any such error was harmless under the Watson standard of prejudice. (*People v. Watson, supra,* 46 Cal.2d at p. 836.) Defendant claimed the homicide he admittedly committed was justified because he had acted in reasonable self-defense. The jury, which heard defendant testify and was able to view the unrefutable videotape of the events immediately preceding the shooting, rejected defendant's claim that he had an actual and reasonable belief in the need for self-defense when he shot Gilbert and that defendant's killing of Gilbert therefore was lawful. The jury had before it multiple examples of inconsistencies in defendant's statements regarding both the events which led up to the shooting and his mental states at that time. For example, the evidence at trial revealed that, during his interview with Sergeant Icely, defendant admitted the Pontiac was moving "very slowly," approximately "one mile an hour" yet he testified he was not able to get out of the way because the car was moving too fast. Defendant also testified he "didn't look at [the Pontiac's] wheels" because he was standing directly in front of the car, but this testimony was contradicted by the videotape evidence and by the forensic evidence which showed that

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of the events leading up to the shooting suggest his actions were irrational. We have found no evidence in the record or claim by the district attorney that Gilbert's actions were considerate or polite. In any event, as to this newly offered ground for admissibility, we are convinced the trial court would have made the identical Evidence Code section 352 determination, a determination we have held not to constitute an abuse of discretion.

the bullet entered at an angle and went across Gilbert's forehead rather than straight through his skull. Defendant claimed in the Icely interview and at the scene that he fired the shot because the car was heading at the security guard, yet he testified at trial that the car was heading straight for him, and that he did not even know there was a second security guard on scene until after he fired the fatal shot. In the Icely interview, defendant claimed he hesitated to let the driver see him but later testified he did not hesitate at all, that he fired immediately and instinctively. At trial he testified he "didn't aim at anything" but also testified that he was "sure" where the bullet was going, that he intended to fire at the car, intentionally shooting into a position where he thought the driver would be, and that he hoped the driver would "duck[ ]." Such a plethora of inconsistencies in his statements regarding the homicide seriously undermined defendant's claim that he had an actual and reasonable need to defend himself with the use of deadly force at the time he shot into the Pontiac.

Furthermore, given defendant had had no face-to-face encounter with Gilbert and could not even see Gilbert at the time of the shooting, his claim of self-defense necessarily rested upon the confrontation he earlier had witnessed between the security guard and the original driver, the noises he had heard while shielded by the minivan, and the events he had witnessed, including his earlier having observed defendant and the original driver in animated conversation and Gilbert twice reaching under the seat of the Pontiac. Whether the use of drugs or the fear of being apprehended motivated Gilbert to drive in a manner in which he appeared to be attempting to exit

his parking stall bore little, if at all, upon defendant's reaction to the entire situation and to defendant's actions. Furthermore, as noted above, the jury knew that, although Petrakovitz had not found a weapon under the front seat of the car Gilbert was driving, "other items" had been found under that front seat and that those items had been seized by Petrakovitz.

In light of the above, we are convinced it is not reasonably probable the admission of proffered evidence that defendant had used cocaine and/or the admission of evidence that there was crack cocaine under the driver's seat of the Pontiac would have convinced the jury that defendant had an actual and reasonable belief in the need to defend himself with deadly force when he fired the fatal shot at Gilbert. Consequently, we conclude that any error in failing to admit such evidence did not affect the judgment.

Adequacy of Instructions on Lesser Included Offense of Involuntary Manslaughter

Defendant was charged with murder. His jury was instructed on murder and the lesser included offenses of voluntary and involuntary manslaughter. Section 192, the statutory offense for which defendant stands convicted, reads, in pertinent part as follows: "Manslaughter is the unlawful killing of a human being without malice. It is of three kinds: . . . [¶] (b) Involuntary – in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." The variant of involuntary manslaughter

requiring proof of an "unlawful act" includes both misdemeanors and infractions although historically it had been denominated "misdemeanor manslaughter." (*People v. Lee* (1999) 20 Cal.4th 47, 51; *People v. Wells* (1996) 12 Cal.4th 979, 982, fn. 2; CALJIC No. 8.45 (6th ed. 1996).)

Defendant contends he is entitled to a reversal of his conviction based upon his claim that the jury instructions "were defective because the trial court failed, as required both by CALJIC and caselaw, to identify and define for the jury the precise misdemeanors or infractions that could have supported a verdict of unlawful-act manslaughter." In turn, he argues that, by failing to identify for the jury which misdemeanors or infractions were shown by the evidence, the trial court also erred by failing "to instruct the jury as to the essential elements of those offenses." For the reasons stated below, we conclude that any such instructional error as to the lesser included offense of involuntary manslaughter was harmless in this case.

Defendant's jury generally was instructed on the lesser included offenses of voluntary and involuntary manslaughter as follows.

The court first told the jury that "[t]he crime of manslaughter is the unlawful killing of a human being without malice aforethought. . . . It is of two kinds, namely, voluntary manslaughter and involuntary manslaughter. [¶] Every person who unlawfully kills another human being without malice aforethought but with an intent to kill, is guilty of voluntary manslaughter. . . . [¶] There is no malice aforethought if the killing occurred in the actual but unreasonable belief in the necessity to

defend oneself against imminent peril to life or great body [sic] injury. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human being was killed; [¶] 2. The killing was unlawful; [¶] 3. The killing was done with the intent to kill. [¶] The killing is unlawful if it was not justifiable."

The court next explained that "[a] lesser and included offense of murder . . . is involuntary manslaughter. [¶] Every person who unlawfully kills a human being, without malice aforethought and without an intent to kill, is guilty of the crime of involuntary manslaughter in violation of . . . section 192, subdivision (b)."

By an instruction patterned upon CALJIC No. 8.45 (6th ed. 1996), the trial court specifically instructed the jury that a killing is unlawful within the meaning of the involuntary manslaughter instruction "if it occurred: [¶] 1. During the commission of an unlawful act which is dangerous to human life under circumstances of its commission; [¶] 2. In the commission of an act, ordinarily lawful, which involves a high degree of risk or of death or great bodily harm, without due caution and circumspection. [¶] The commission of an unlawful act, without due caution and circumspection, . . . would necessarily be an act that was dangerous to human life in its commission. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. A human was killed; [¶] 2. The killing was unlawful."

The trial court omitted from CALJIC No. 8.45 the following language: "An 'unlawful act' [not amounting to a felony] consists of a violation of ___ Code section[s] ___." The Use Note to CALJIC No. 8.45 at page 430

explains that "[t]his instruction must be supplemented by defining the misdemeanor or misdemeanors identified in the fourth paragraph" and that "[t]he language 'not amounting to a felony' . . . would be required only if the jury has to distinguish felonies from misdemeanors because of the other crimes charged or referenced in the evidence."

Assuming the involuntary manslaughter instructions based upon unlawful act-manslaughter should have included an instruction on the target or predicate unlawful acts which may have been involved *(People v. McManis* (1972) 26 Cal.App.3d 608, 614; *People v. Williams* (1975) 13 Cal.3d 559, 562-563)[5] and assuming that any such error was not invited by the defense *(People v. Wickersham* (1982) 32 Cal.3d 307, disapproved of on other grounds in *People v. Barton* (1995) 12 Cal.4th 186, 199-200; *People v. Bunyard* (1988) 45 Cal.3d 1189; 1234),[6] we consider

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[5] We are unpersuaded by the People's argument that the California Supreme Court overruled *Williams* sub silencio through its opinion in *People v. Wells, supra,* 12 Cal.4th 979, and that, therefore, "[i]nstructing on the so-called 'target offenses' is mere surplusage and therefore not required." We continue to feel bound by the holding in *Williams* that the standard instruction on involuntary manslaughter "must be supplemented by defining the inherently-dangerous-to-human-life misdemeanor or misdemeanors involved and by specifying what conduct under the evidence could constitute such misdemeanor or misdemeanors. [Citations.]" (*People v. Williams, supra,* 13 Cal.3d at p. 563; see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

[6] We are unpersuaded that the doctrine of invited error applies here because the record does not make clear that counsel acted for tactical reasons, and not out of ignorance or mistake, when he, as well as the prosecution, agreed that the

whether such instructional error requires a reversal of the judgment in this case.

Defendant was charged with murder based upon his killing Anthony Gilbert by intentionallly firing a gun aimed at Gilbert. (§ 187.) As noted above, his jury was instructed on the charged offense of murder and on the lesser included offenses of voluntary and involuntary murder. The jury also was instructed on defendant's sole defense, namely, that his admitted act of shooting Gilbert was not unlawful because it was done in the actual and reasonable belief in the need for self-defense. Defendant does not challenge the adequacy of the self-defense instructions given nor does he claim he was entitled to instructions as to other forms of justifiable homicide, such as instructions on accident or involuntary unconsciousness. The jury rejected defendant's claim of reasonable self-defense and found defendant guilty of involuntary manslaughter. Defendant does not dispute that his jury was properly instructed that involuntary manslaughter is the unlawful killing of a human being without malice or the intent to kill and that it was correctly instructed that "[i]n order to prove [involuntary manslaughter], each of the following elements must be proved: [¶] 1. A human being was killed; [¶] 2. The killing was unlawful."

Typically, a defendant charged with murder who complains about the inadequacy of the instructions given on the lesser offense of involuntary manslaughter has

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misdemeanors were not to be defined. (*People v. Duncan* (1991) 53 Ca1.3d 955, 969; *People v. Cooper* (1991) 53 Cal.3d 771, 830-831; *People v. Bunyard*, supra, 45 Cal.3d at p. 1234.)

been convicted of either murder or voluntary manslaughter and argues on appeal that a jury given proper instructions on involuntary manslaughter would have convicted him of involuntary manslaughter, as opposed to the more serious offense for which he stands convicted. (See, e.g. *People v. Blakeley,* (2000) 23 Cal.4th 82; *People v. Lasko* (2000) 23 Cal.4th 101; *People v. Glenn* (1991) 229 Cal.App.3d 1461 [reversal of conviction for voluntary manslaughter because of the trial court's failure to instruct the jury on the lesser included offense of involuntary manslaughter]; *People v. Welch* (1982) 137 Cal.App.3d 834 [same].)[7] Here, where defendant concedes he killed Gilbert by shooting him and where he has been convicted of involuntary manslaughter, the least serious form of an unlawful killing of a human being in this state, his argument that he is entitled to a reversal based upon error in the involuntary manslaughter instructions cannot succeed unless the error is reversible per se or unless the error may have caused him to have been convicted of an unlawful killing, as opposed to having been acquitted on the basis of a justifiable homicide committed in actual and reasonable self-defense. Defendant can make no such showing in this case.

We first turn our attention to the California Supreme Court case which dealt with what defendant concedes was a "somewhat analogous" situation in which the trial court erred by failing to define for the jury potential target or predicate offenses where the defendants were charged with murder and the jury was instructed that it

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[7] Both *Glenn* and *Welch* were abrogated by the holding in *People v. Blakeley, supra,* 23 Cal.4th at p. 91.

could find one of the defendants guilty if it found she had aided and abetted the murder or that the murder was a natural and probable consequence of any uncharged offenses that she had aided and abetted. In *People v. Prettyman* (1996) 14 Cal.4th 248, the court held that, once the trial court chose to instruct on the natural and probable consequences doctrine, it had a duty to give the jury instructions defining the target or predicate offenses which were supported by the evidence. (*Id.*, at p. 269.) The *Prettyman* court then held that this state law instructional error was harmless under the standard of review set forth in *People v. Watson, supra,* 46 Cal.2d 818, 836. It found that failure to instruct on the elements of the predicate or target offenses underlying the natural and probable consequences doctrine did not constitute a failure to instruct on the elements of the crime with which the defendant was charged and that, therefore, "the trial court's failure to identify and describe the target crimes when instructing on the 'natural and probable consequences' rule did not violate [the] defendant's federal due process rights." *(People v. Prettyman, supra,* 14 Cal.4th at pp. 270-271.)

Similarly, in the instant case, we conclude the trial court did not neglect to instruct on any element of involuntary manslaughter as set forth in the statute defining manslaughter (§ 192). (See *People v. Prettyman, supra,* 14 Cal.4th at p. 271.) Here, analogous to *Prettyman,* where the failure to identify or describe the target or predicate misdemeanors did not withdraw an element from the jury's determination but did create an ambiguity which left open the possibility that "the jury might engage in unguided speculation" in making the requisite factual

finding (*id.*, at p. 272), we must determine " 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, quoting *Boyde v. California* (1990) 494 U.S. 370, 380; see also *People v. Prettyman, supra,* 14 Cal.4th at p. 272.)

Here, none of the parties mentioned the challenged unlawful act-manslaughter instruction in their closing argument to the jury. The prosecutor's theory was that "defendant's conduct was unreasonable" and that he was "in fact, guilty of second degree murder" under an implied malice theory. In fact, the prosecutor reiterated the elements of second degree murder and then told the jury that "if there's evidence about these elements that has not been proven to you beyond a reasonable doubt, then you should acquit the defendant." The defense, in closing argument, claimed defendant acted in reasonable self-defense when he took out his gun and shot into the car which Gilbert was driving. Because neither party made reference to the unlawful act-manslaughter theory in argument to the jury, it is highly unlikely the jury relied upon that rule when it convicted defendant of involuntary manslaughter. Rather, it appears the jury was persuaded by defendant that he unintentionally killed Gilbert while acting in self-defense but concluded that defendant's belief in the need for self-defense was unreasonable under the circumstances. Having been instructed that voluntary manslaughter requires an intent to kill, the jury would have acquitted defendant of voluntary manslaughter but would have convicted him of an unlawful killing of a human being without malice or the intent to kill, i.e., involuntary manslaughter, where it believed

defendant unintentionally killed a human being while operating under the actual but unreasonable belief in the need for self-defense. (See *People v. Prettyman, supra,* 14 Cal.4th at pp. 272-274.)[8] Furthermore, even if the jury relied upon the unlawful act-manslaughter theory in convicting defendant, "there is little likelihood in this case that the trial court's failure to identify and describe potential target crimes caused the jury to misapply the doctrine." (*Id.,* at p. 273.) Here, defendant brandished his firearm and then immediately shot Gilbert in the head. Once the jury rejected defendant's reasonable self-defense theory, his acts of brandishing and then shooting at the victim as he sat in his car were indisputably unlawful. Under these circumstances, it is highly unlikely the trial court's failure to specify brandishing (§ 417) as a target or predicate misdemeanor led the jury to misapply the misdemeanor-manslaughter doctrine by convicting defendant of involuntary manslaughter on the theory that he was carrying a firearm without a permit, as defendant speculates. Accordingly, there is not " ' "a reasonable likelihood that the jury has applied the challenged instruction in a way" that violates the Constitution' " (*Estelle v. McGuire, supra,* 502 U.S. at p. 72), and the trial

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[8] The recent holding by the California Supreme Court in *People v. Blakeley, supra,* 23 Cal.4th at p. 85, that voluntary manslaughter, as opposed to involuntary manslaughter, is committed "when a defendant, acting with conscious disregard for life and the knowledge that the conduct is life-endangering, unintentionally but unlawfully kills while having unreasonable but good faith belief in need to act in self-defense," is prospective only and thus does not directly affect defendant's case.

court's failure to give instructions identifying or describing any target or predicate misdemeanors that might have supported a misdemeanor-manslaughter verdict "did not violate defendant's *federal* constitutional right to due process of law." (*People v. Prettyman, supra,* 14 Cal.4th at p. 274.) (Emphasis added.)

However, the assumed error in this case did violate state law. Relying in part upon the analysis in *Prettyman,* we conclude the state error of failing to identify and specify the predicate unlawful act underlying the unlawful act-manslaughter form of involuntary manslaughter was harmless under the *Watson* standard of review. The appropriateness of applying a *Watson* analysis to a trial court's failure to instruct as to the specific unlawful acts which could support the lesser included offense of involuntary manslaughter was reaffirmed in *People v. Breverman* (1998) 19 Cal.4th 142, 178, in which a majority of the California Supreme Court held that "in a noncapital case, error in failing sua sponte to instruct, or to instruct fully, on all lesser included offenses and theories thereof which are supported by the evidence must be reviewed for prejudice exclusively under [*People v.*] *Watson*[, *supra,* 46 Cal.2d 818, 836]." As discussed above, the prosecution argued defendant's conduct was so unreasonable that it constituted implied malice and warranted a guilty verdict for second degree murder while the defense theory was that defendant's act of shooting Gilbert was conducted under the actual and reasonable belief in the need for self-defense. Given the facts of this case and the arguments before the jury, we are convinced it is not reasonably probable defendant would have obtained a more favorable outcome in the absence of the trial court's

instructional error. (*People v. Watson, supra,* 46 Cal.2d at p. 836; see also *People v. Prettyman, supra,* 14 Cal.4th at p. 274.)

As noted by footnote earlier in this discussion, in *People v. Blakeley, supra,* 23 Cal.4th at p. 85, the California Supreme Court recently held that voluntary manslaughter, as opposed to involuntary manslaughter, is committed "when a defendant, acting with conscious disregard for life and the knowledge that the conduct is life-endangering, unintentionally but unlawfully kills while having an unreasonable but good faith belief in the need to act in self-defense." Although the case is prospective in its application, portions of its analysis prove instructive in explaining why any error in the involuntary manslaughter instructions given in the case before us was harmless. In *Blakeley,* a man named Vallo swung a bottle at defendant and missed, but defendant hit Vallo with a bottle. After throwing a bottle at defendant but missing, Vallo charged at defendant. Defendant drew a knife from his belt sheath, and a struggle ensued. When the two were separated, Vallo was bleeding from a chest wound, and he died from that single stab wound. At trial, defendant testified he drew his knife to defend himself when Vallo charged, the two fought, and Vallo apparently impaled himself on the knife during the struggle; he said he did not realize Vallo had been stabbed until after the fight was over. (*Id.,* at pp. 85-86.) The trial court instructed on the charged crime of murder and on the lesser included offenses of voluntary and involuntary manslaughter. As to voluntary manslaughter, it told the jury an unlawful killing without malice aforethought but with an intent to kill is voluntary manslaughter but "[t]here is no malice

aforethought if the killing occurred in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury." The court refused to give the defendant's requested instruction that a killing is involuntary manslaughter when the killer, acting in an unreasonable but good faith belief in the necessity of self-defense, unintentionally causes the victim's death.

Significant to the case before us, *Blakeley* held that, given three prior appellate cases which had held an unintentional killing in unreasonable self-defense is involuntary manslaughter and given the standard instruction on involuntary manslaughter did not explain that a defendant who commits an unintentional killing in unreasonable self-defense is guilty of involuntary manslaughter, the trial court had erred by failing to give defendant's requested instruction. (*People v. Blakeley, supra*, 23 Cal.4th at p. 86, fn. 1.) However, the court ultimately found the instructional error harmless and affirmed the conviction. (*Id.*, at pp. 93-94.)

The case before us falls under the pre-*Blakeley* cases which had held that an unintentional killing in unreasonable self-defense is involuntary manslaughter. (*People v. Ceja* (1994) 26 Cal.App.4th 78, 86; *People v. Glenn, supra*, 229 Cal.App.3d at p. 1467; *People v. Welch, supra*, 137 Cal.App.3d at p. 382.)

The *Blakeley* court considered whether the defendant had suffered prejudice from the trial court's failure to instruct that an unintentional killing in unreasonable self-defense is involuntary manslaughter under the *Watson* standard of review. It explained that, though the trial

court did not instruct that an unintentional killing in unreasonable self-defense is involuntary manslaughter, it had instructed on two theories of involuntary manslaughter, neither of which required an intent to kill. These two theories were that an unlawful killing is involuntary manslaughter if it occurs during the offense of brandishing a weapon or in the commission of an ordinarily lawful act which involves a high degree of risk of death or great bodily harm, without due caution and circumspection. The trial court also had given the standard instruction defining the elements of voluntary manslaughter, which told the jury that one element of voluntary manslaughter that must be proved is that the killing was done with the intent to kill. *Blakeley* reasoned that "[t]hus, if the jury had concluded that defendant had unintentionally killed Vallo in unreasonable self-defense, it most likely would not have convicted defendant of voluntary manslaughter, which, it was told, requires an intent to kill." (*People v. Blakeley, supra*, 23 Cal.4th at pp. 93-94.)

Here, defendant conceded he was the person who killed Gilbert by shooting him but claimed the killing was unintentional and that it was lawful because it was justified by his actual and reasonable belief in the need for self-defense. Once the jury rejected defendant's claim of reasonable self-defense, it was left with the fact that defendant had, at best, committed an unlawful killing without malice or the intent to kill, i.e., an involuntary manslaughter in violation of section 192, subdivision (b). The jury was instructed that it must find the requisite culpable act, that the act must have caused the death, and that the act must have been committed with criminal

negligence. The questions they were asked and conclusions they reached – what act occurred, was defendant criminally negligent or did he act in self-defense – were reached regardless of any instruction defining any misdemeanor offenses. The jury was told the act must be dangerous to human life or safety under the present circumstances of its commission. It further was instructed on the applicable principles of self-defense, and conversely, on the principles of implied malice murder. By its verdict, the jury explicitly rejected both the People's and the defendant's theories of self-defense and implied malice murder. (See, e.g., *People v. Williams, supra,* 13 Cal.3d at p. 564; *People v. Beach* (1983) 147 Cal.App.3d 612, 627.) Given defendant does not challenge the self-defense instructions in his case or the jury's rejection of reasonable self-defense on those instructions, and given the fact the jury was then left with an admitted unintentional killing which, at best, was done in the actual but unreasonable belief in the need for self-defense, there is no doubt "the verdict was actually based on a valid ground," namely, that defendant committed an unlawful killing without malice and without the intent to kill. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) We find defendant's suggestion that the jury could have based its involuntary manslaughter conviction solely upon the unlawful act that defendant was *carrying* a weapon without a permit a mere theoretical possibility which is essentially inconceivable, here, where defendant conceded he shot and killed Gilbert and the jury rejected his sole defense that such a killing was justified based upon reasonable self-defense. Accordingly, we are convinced it is not

reasonably probable the instructional error in this case affected the outcome of the trial.

In holding the instructional error as to the lesser offense harmless under a *Watson* standard of review, we reject defendant's arguments for why the trial court's failure to specify and define the "predicate" unlawful acts which could support unlawful act-manslaughter is either "reversible per se" or reviewable under the federal standard of review set forth in *Chapman v. California* (1967) 386 U.S. 18, 36. First, relying upon *People v. Green* (1980) 27 Cal.3d 1 and *People v. Guiton, supra,* 4 Cal.4th 1116, defendant argues his conviction for the lesser included offense of involuntary manslaughter must be reversed because his jury "was misinstructed on one theory of involuntary manslaughter and there is no basis in the record for determining that the jury relied on a valid legal theory of involuntary manslaughter." However, in *People v. Harris* (1994), 9 Cal.4th 407, the California Supreme Court clarified that, "[i]n using the terminology 'legally incorrect theory' in *Green*, [they] were . . . referring specifically to instructional error, or a 'legally incorrect' theory of the case which, if relied upon by the jury, could not *as a matter of law* validly support a conviction of the *charged* offense." (*Id.*, at p. 419, second emphasis added.) Given defendant here makes no argument concerning an alleged misinstruction or invalid legal theory as to the charged offense, here, as in *Harris*, "*Green is* distinguishable, and its rule of reversal inapplicable here." (*Ibid.*)[9] Second, as

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[9] We additionally point out that the *Green-Guiton* lines of cases is inapplicable here, where the prosecution did not "present [ ] its case to the jury on alternate legal theories, some

noted above, we have concluded that any instructional error in this case was a violation of state, rather than federal law, and accordingly, the *Chapman* federal standard of review similarly does not apply. However, assuming arguendo the federal standard would apply here, we additionally conclude that, in light of the jury's rejection of defendant's claim of justifiable homicide based upon reasonable self-defense, the evidence of involuntary manslaughter, i.e., an unlawful killing of a human being without malice, is "so overwhelming as to leave it beyond a reasonable doubt that the verdict resting on that evidence would have been the same in the absence of the [instructional error]." (*Yates v. Evatt* (1991) 500 U.S. 391, 403-405; see also *Neder v. United States* (1999) 527 U.S. 1, 15; *Chapman v. California, supra,* 386 U.S. at p. 36.)

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of which are legally correct and others legally incorrect." (*People v. Green, supra,* 27 Cal.3d at p. 69.) As previously noted, the jury was correctly instructed on the charged offense of murder and was correctly instructed on the lesser included offense of involuntary manslaughter in the abstract; the error was in the court's failure to give an instruction defining and enumerating the misdemeanors which could support the correct instructions on involuntary manslaughter. Significantly, the prosecution did not present its case on two theories; to the contrary, the prosecutor did not request the involuntary manslaughter instruction in question and did not discuss the application of manslaughter to the case, outside of merely suggesting that it did not apply. In fact, the prosecutor specifically told the jury that defendant should be convicted of second degree murder and that, if the elements of second degree murder had not been proven beyond a reasonable doubt, defendant was entitled to an acquittal.

Instructional Error on the Firearm Enhancement

The information alleged defendant had violated subdivision (b) of section 12022.5, which creates an enhancement for "any person who is convicted of a felony . . . in which that person discharged a firearm at an occupied motor vehicle which causes great bodily injury or death to the person of another. . . . " Pursuant to that allegation, the jury returned a finding that "at the time of and in commission and attempted commission of the [lesser-included offense of involuntary manslaughter], the . . . defendant . . . , personally discharged a firearm, to wit: a .38 CALIBER REVOLVER, at an occupied motor vehicle which caused death to the person of another."

However, although the enhancement was correctly read to the jury in the form of the information, the trial court only read the instruction pertaining to personal use of a firearm, an instruction normally given for an enhancement charged under subdivision (a) of section 12022.5. Pursuant to CALJIC No. 17.19, the jurors were told that, if they found defendant guilty of the charged or lesser included felony offense, they "must determine whether the defendant personally used a firearm in the commission of that felony" and that "[t]he term personally used a firearm as used in this instruction, means the defendant must have intentionally displayed a firearm in a menacing manner, intentionally fired it, or intentionally struck or hit a human being with it."

Defendant contends the trial court's "failure to instruct that the firearm must have been 'discharged at an

occupied motor vehicle' " was prejudicial;[10] the People correctly concede the trial court erred by failing to properly define all of the elements of the sentence enhancement for discharging a firearm at an occupied motor vehicle but argue the error was harmless.

In *People v. Wims* (1995) 10 Cal.4th 293, the California Supreme Court held that the failure to give proper jury instructions regarding the meaning of an enhancement allegation which is tried before a jury does not violate the right to trial by jury under the Sixth Amendment as incorporated by the Fourteenth Amendment. (*Id.*, at p. 303.) Citing *McMillan v. Pennsylvania* (1986) 477 U.S. 79, 89-90, the *Wims* court concluded that "[t]he [United States] Supreme Court, moreover, has specifically determined the Sixth Amendment does not require jury fact-finding when a statute-like section 12022(b) makes weapon possession a sentencing factor rather than an element of a crime. [Citation.]" (*People v. Wims, supra,* at p. 305.) Concluding an enhancement is not a separate crime or offense, the *Wims* court held any instructional error regarding an enhancement, including the complete lack of instructions, is solely a state law claim subject to the state harmless error test articulated in *People v. Watson supra,* 46 Cal.2d at p. 836. (*People v. Wims, supra,* at pp. 314-315.)

Under almost all circumstances, we would be bound by *Wims* to apply our state harmless error analysis to the

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[10] Defendant notes that he "is not concerned with the failure to instruct that [the firearm] caused death, for manifestly it did."

error which occurred in instructing the jury on the firearm enhancement (Arto *Equity Sales, Inc. v. Superior Court, supra,* 57 Ca1.2d at p. 455.) However, in this particular instance, we recognize the need to discuss the effect of the June 26, 2000, decision of the United States Supreme Court in *Apprendi v. New Jersey* (2000) ___ U.S. ___, [120 S.Ct. 2348, 147 L.Ed.2d 435] on the trial court's failure to correctly instruct the jury on the elements of a firearm enhancement.[11]

Citing *Apprendi v. New Jersey, supra,* ___ U.S. ___ [120 S.Ct. 2348] and *Jones v. United States* (1999) 526 U.S. 227, defendant argues the failure to properly instruct as to the elements of a section 12022.5, subdivision (b) enhancement is a violation of the due process clause of the Fourteenth Amendment and that such failure to instruct on an element of the enhancement "must be reviewed for federal constitutional error under *Chapman v. California, supra,* 386 U.S. 18." We agree.

As noted above, on June 26, 2000, the United States Supreme Court issued its opinion in *Apprendi v. New Jersey, supra,* ___ U.S. ___ at pages ___ - ___ [120 S.Ct. at pages 2357-2368]. Pursuant to our request, the parties orally argued the effect of the *Apprendi* opinion on our case. In *Apprendi,* the United States Supreme Court invalidated a portion of a New Jersey statute which allowed a judge to making findings concerning the purpose of an offense utilizing a preponderance of the evidence standard. Pursuant to that statute, if a trial judge found the

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[11] We note that the California Supreme Court apparently will consider how *Apprendi v. New Jersey, supra,* affects our state enhancement statutes in *People v. Sengpadychith,* S090076.

offense was committed " ' . . . with a purpose to intimidate an individual or group of individuals because of race, color, gender, handicap, religion, sexual orientation or ethnicity,' " the maximum prison sentence for such an offense was increased " 'between 10 to 20 years.' " (*Apprendi v. New Jersey, supra,* ___ U.S. at p. ___, [120 S.Ct. at p. 2351].) The *Apprendi* court explained that "[t]he question presented is whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." (*Apprendi v. New Jersey, supra,* ___ U.S. at p. ___, [120 S.Ct. at p. 2351].) The Supreme Court then noted that its answer to the question whether Apprendi had a constitutional right to have a jury find such bias on the basis of proof beyond a reasonable doubt "was foreshadowed by our opinion in *Jones v. United States, supra,* 526 U.S. 227, construing a federal statute. We there noted that 'under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.' *Id.*, at 243, n. 6 [119 S.Ct. 1215]. The Fourteenth Amendment commands the same answer in this case involving a state statute." (*Apprendi v. New Jersey, supra,* ___ U.S. at p. ___, [120 S.Ct. at p. 2355].) After reexamining its cases in this area and the history upon which they relied, the United States Supreme Court confirmed the opinion it had expressed in *Jones* and concluded that, "[o]ther than the fact of a prior conviction, any fact that

increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.' [Citation.]" (*Apprendi v. New Jersey, supra,* ___ U.S. at pp. ___ to ___, [120 S.Ct. at pp. 2362-2363].)

In *Apprendi,* the Court discussed its prior ruling in *McMillan v. Pennsylvania, supra,* 477 U.S. at pages 86-88. As noted above, in *Wims,* our state Supreme Court relied extensively upon *McMillan* in concluding the United States Constitution did not guarantee a jury trial on an issue of the validity of a firearm enhancement allegation. (*People v. Wims, supra,* 10 Cal.4th at pp. 304-309.) In *Apprendi,* the United States Supreme Court limited its prior holding in *McMillan* as follows: "We do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict – a limitation identified in the *McMillan* opinion itself." (*Apprendi v. New Jersey, supra,* ___ U.S. at p. ___, fn. 13, [120 S.Ct. at p. 2361].)

In light of the above, we believe that the portion of the *Wims* decision which held that the federal Constitution does not guarantee the right to trial by jury under the Sixth Amendment of a firearm allegation which can result in the imposition of a sentence more severe than

the statutory maximum for the offense established by the jury's verdict has been abrogated by *Apprendi*. Although the United States Supreme Court did not resolve whether *Apprendi* may be applied to trials completed prior to its filing date, June 26, 2000, we note that a federal court recently concluded that because the case before it came to it on direct review, "there can be no question that [the defendant] is entitled to the benefit of *Apprendi's* new rule. See *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987)." (*United States v. Nordby* (9th Cir. 2000) 225 F.3d. 1053.)

Here, defendant's conviction for involuntary manslaughter could have resulted in a sentence of four years in state prison (§ 192, subd. (b)) and did result in a sentence of three years, and the finding pursuant to section 12022.5, subdivision (b)(1) increased that sentence by adding consecutively an additional 6 years. We conclude defendant was entitled to have a jury determine whether his conduct fell within the provisions of section 12022.5, subdivision (b) beyond a reasonable doubt. We also conclude, under the compulsion of *Apprendi*, that the failure to instruct the jury that it had to find that defendant discharged the firearm "at an occupied motor vehicle" and that the firing caused great bodily injury or death (§ 12022.5, subd. (b)) violated the Fourteenth Amendment due process clause and that the *Chapman* standard of reversible error applies to such a failure to instruct on these elements of the section 12022.5, subdivision (b) enhancement allegation. However, we are convinced the failure to so instruct the jury was harmless beyond a reasonable doubt in this case. (*Chapman v. California, supra*, 386 U.S. at p. 24.) Here, while defendant's jury was not instructed in the precise language of section 12022.5,

subdivision (b), the elements were listed in the verdict form which the jury returned and were contained in the information which was read to the jury at two separate times, including during instructions. Most important, there is no question defendant discharged a firearm at an occupied motor vehicle, thereby causing death to the person of another. Whether defendant fired his gun directly at Gilbert as Gilbert sat in the driver's seat of the vehicle was the subject of some dispute, as was defendant's description of the firing as "instinctive." However, there was no question defendant intentionally discharged his weapon at the occupied vehicle.[12] In his statement to

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[12] Defendant argues the enhancement would not have been otherwise proven because there was no instruction requiring the jury to find the discharge of the weapon was "intentional." In support of his argument on prejudice, he cites cases in which the evidence suggested the firing of the gun was either accidental (*People v. Southack* (1952) 39 Cal.2d 578) or nonvolitional due to negligent handling (*People v. Alotis* (1964) 60 Cal.2d 698). Here, however, there was no evidence or any suggestion that defendant's discharge of the firearm into the occupied motor vehicle was accidental or nonvolitional. To the contrary, defendant conceded the discharge of the firearm was a volitional, albeit instinctive, act, but he then claimed such act was justified based upon his actual and reasonable belief in the need to defend himself. Defendant's citation to *Wims, supra*, at page 302, in support of his argument, is inapposite given the statute at issue there, namely, section 12022.5, contains different statutory language than the statute at issue here and does not involve the enhanced risk of harm involved in the discharge of a firearm at an occupied motor vehicle and the required resultant death or great bodily injury to a person other than the defendant. The only restriction on section 12022.5, subdivision (b) is that it may not be applied vicariously. (*People v. Gutierrez* (1996) 46 Cal.App.4th 804.) Section 12022.5 was enacted "to deter the use of firearms . . . [and] to check the magnified risk of

Sergeant Icely, defendant admitted he fired at the Pontiac's front window and that he wished he had shot at "the radiator" instead. At trial, defendant impliedly admitted he had shot at the Pontiac when he testified he fired "[t]o stop the car from hitting [him]," and he later testified he was aware it was dangerous to shoot in a crowded mall lot but that he was "sure where [his] bullet was going to go" because "it went into the position where the driver would have been" and that that was the position he "instinctively" was "aiming for." He earlier had testified, "I instinctively pulled my gun and shot him."

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serious injury which accompanies any deployment of a gun in a criminal endeavor." (*People v. Granado* (1996) 49 Cal.App.4th 317, 321.) The enhancement "was intended in significant part to constrain a [defendant] to keep the gun in his waistband." (*Id.*, at p. 327.) Therefore, although courts have construed subdivision (a) of section 12022.5 as requiring an intentional use, such construction does not necessarily carry forth into subdivision (b). (See, e.g., *People v. Granado, supra*, 49 Cal.App.4th at p. 322 [interpreting "use" more broadly than under section 1203.06 to carry out the legislative intent of deterring the use of firearms].)

We similarly are unpersuaded by defendant's argument that the verdict of involuntary manslaughter conclusively shows he acted negligently, as opposed to intentionally. The fact defendant was convicted of criminally negligent homicide does not mean he did not commit an intentional act during its commission. (See, e.g., *People v. Cazares* (1987) 190 Cal.App.3d 833 [conviction of involuntary manslaughter for intentionally firing into crowded dance hall].) As discussed above, the likely basis for the verdict was the jury's belief that, although defendant intentionally fired into the vehicle, he did not intend to kill Gilbert when he fired the fatal shot. Given so-called volitional defenses have been abrogated in California (§§ 21, 25), the fact defendant claimed to have fired "reactively" or "instinctively" is of no import.

Defendant later added, that, although there was a glare on the windshield that interfered with his vision, he knew "where to aim [his] gun. . . . [¶] [b]ecause drivers usually sit behind . . . the steering wheel." Finally, in his last moment of testimony during crossexamination, defendant testified that the bullet "went to the car *where I intended it to go.* I was hoping that [Gilbert] had ducked or I had missed him, that something had stopped it." (Emphasis added.) There were only two theories argued in this case, acquittal based upon justifiable self-defense and murder. Once the jury rejected defendant's self-defense theory and found that defendant had unlawfully killed another human being without malice, the jury would have had to find the facts underlying the discharging a firearm enhancement to be true.[13]

Accordingly, we are convinced the trial court's failure to instruct the jury that it had to find defendant discharged the firearm "at an occupied motor vehicle" and that the firing caused great bodily injury or death

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[13] Defendant's reliance upon *People v. Gutierrez, supra,* 46 Cal.App.4th 804 to argue the state has not carried its burden to show that the failure to instruct was harmless beyond a reasonable doubt, is misplaced. In that case, the finding of prejudice rested upon the fact the appellate court could not "conclude that the failure of proof of identity of the shooter who personally caused the death justifies the imposition of the sentence enhancement on all three defendants" and that, accordingly, the "prosecution has simply not met its burden of proof." (*Id.*, at p. 816.) Here, we have no proof problems regarding the identity of the person who fired the firearm in question or whether that person fired at an occupied vehicle.

(§ 12022.5, subd. (b)) was harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. at p. 24.)[14]

Eligibility For Probation

In his final argument, defendant contends that, in evaluating his eligibility for probation, the trial court improperly considered a "confidential personnel report within the meaning of . . . section 832.7" and oral related testimony concerning a 1967 shooting incident which allegedly caused defendant to resign from the police force in lieu of being dismissed.

After the case was assigned for trial, the prosecutor caused a subpoena duces tecum to be issued to the Mountain View Police Department for production of an index card pertaining to defendant. The card had come to the prosecutor's attention when, unsolicited, a retired police captain named Jerry Fairfield showed it to a district attorney investigator. The last entry on that card was dated March 29, 1968, and the notation read, "resigned in lieu of being . . . dismissed." The defendant objected to the admission of this evidence at trial, and the matter was

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[14] Defendant also contends that, "because the enhancement allegation must be reversed," he is no longer presumptively ineligible for probation and that, therefore, his case must be remanded to the trial court for a new probation hearing. (Emphasis and capitalization omitted.) Given our determination that the enhancement allegation need not be reversed and that there is ample evidence in the record that defendant intentionally discharged his firearm at the occupied motor vehicle, we summarily conclude this contention is not well taken.

taken under submission. Soon thereafter, defendant moved to exclude evidence that he was involved in the 1967 shooting which occurred a month prior to his resignation from the Mountain View Police Department. The trial court excluded the evidence without prejudice, saying it would "revisit the issue" if, "during the course of the trial, something comes to pass that makes it relevant and probative." The issue was revisited during the sentencing proceedings in which evidence pertaining to both probation eligibility and sentencing was heard in a single proceeding. After defendant had put on significant evidence relating to his years of public service, including evidence related to his work as a police officer in general and to the 1967 shooting incident in particular, the prosecutor renewed her request to introduce the index card.

In ruling the evidence admissible, the trial court reasoned that "rules of evidence are not as strict as they are when you're formally in trial" and that it had "been given, by law, latitude in terms of discretion in terms of evidence that it will receive during the hearing. [¶] In addition, par[ity] and due process calls for the fact that the parties have an opportunity to present evidence of [*sic*] their respective behalves, and also to rebut any statements or contradictions that may be contained within a probation report. And the court having had an opportunity to review the probation report and all the attachments thereto and correspondence is of the opinion that this document is relevant . . . to the extent that it may rebut, as the prosecution is arguing, a statement that's contained in the probation report, and the court can give it whatever weight it feels it is entitled." Thereafter, the

index card and retired captain Fairfield's testimony were admitted.

The applicable standard for reviewing a trial court's sentencing decision is whether, in light of all the circumstances, the court abused its discretion in imposing the punishment. This determination ordinarily would consist of two prongs, probation eligibility and sentencing. Here, however, where defendant has not seriously contested the latter, we follow his lead in focusing upon whether the trial court abused its discretion by finding he had not overcome the presumption that he was ineligible for probation. (§ 1203, subd. (e)(2).)

A sentencing court enjoys broad discretion in ruling on a motion for probation and probation eligibility. (*People v. Warner* (1978) 20 Cal.3d 678, 683.) It is an act of leniency, not of right. (*In re Marcellus L.* (1991) 229 Cal.App.3d 134, 142.) The court may consider all the facts and circumstances of the case (*People v. Axtell* (1981) 118 Cal.App.3d 246, 256-257), as well as "material which would have been inadmissible on the issue of defendant's guilt." (*People v. Evans* (1983) 141 Cal.App.3d 1019, 1021.) Even where a court considers improper material at sentencing, the sentence will be upheld unless the defendant can show a reasonable probability the outcome would be different in the absence of the improper material. (*People v. Clark* (1990) 50 Cal.3d 583, 638, fn. 38; *People v. Harris* (1990) 226 Cal.App.3d 141, 147.)

We are unpersuaded by defendant's claim that "he did not put his conduct in the police department 30 years ago in issue in his probation application." This claim ignores the theme adopted by his counsel at sentencing

that defendant was a responsible citizen who had given a lifetime of public service to the people of San Jose. For example, defendant produced numerous letters from former coworkers in support of his claim of lifelong public service, and he produced testimony concerning prior acts in which he had allegedly engaged in heroics as a police officer., Defendant, rather than the prosecution, interjected evidence of the 1967 shooting into the sentencing proceeding by telling the probation officer preparing his probation report that he had been " 'totally exonerated' " in the 1967 shooting and that he "simply resigned due to wanting to leave the police business in light of the changing times during the 1960's and the bad reputation police were experiencing." During that 1967 incident, defendant shot a bar patron who allegedly was coming at him with a tire iron. However, other officers said the victim was not particularly dangerous and that defendant had overreacted. Though defendant's witness testified the shooting was within department guidelines at the time, on cross-examination that witness noted that the city of Mountain View later settled a large civil suit concerning the incident and that defendant resigned from the force a month after the shooting incident.

Defendant's comments in the probation report opened the door for the prosecutor to bring in evidence to rebut defendant's claim of an unblemished record of lifelong public service. In the course of such rebuttal, retired captain Fairfield testified that he believed defendant was "somewhat overly aggressive" and had "overreacted" during the above shooting incident as well as in other situations. In describing defendant's character, Fairfield added that his first thought after hearing of the

Great Mall shooting was that defendant "was a loose cannon when he was on the police department" and that he had told the district attorney investigator he "could not support [defendant's] brand of enforcement." Fairfield also confirmed he had learned that defendant was "something of a bully" while on the police force, that he was "the kind who when backed into a corner went the other way," and that there had been complaints from younger officers that defendant had thrown "his weight around." Fairfield described defendant as someone who "seemed to overreact when he was confronted." He then described one incident, for which defendant was written up, in which, without provocation or reason, defendant had pulled a shackled inmate out of a patrol car and hit him with his baton until the inmate could not move.

Given the defense specifically emphasized defendant's service as a police officer at sentencing, we are convinced the trial court did not abuse its discretion by finding the challenged evidence relevant to both show defendant's history of uncontrollable behavior and to rebut his claims of unblemished meritorious lifelong public service and his claim that he had retired from the police force due solely to the changing time during the 1960's.

We next consider whether the evidence should have been excluded, despite its relevance, due to the prosecution's failure to follow the requirements of Evidence Code section 1043. In that regard, we note that, after defendant filed his opening brief, this court issued an unpublished opinion on the issue in case number H018529, exonerating the prosecution from any wrongdoing in the matter.

We further note that trial courts have had broad discretion when ruling on a motion for *Pitchess* discovery. (See *Pitchess v. Superior Court* (1974) 11 Cal.3d 531; 535 *People v. Memro* (1995) 11 Cal.4th 786, 832.)

The only question remaining is whether the trial court should have, as the defense requested, excluded the challenged "personnel report card" and "oral testimony . . . about material that, were it in a personnel file, would have been confidential," such as Fairwell's testimony regarding the circumstances surrounding the proceedings against defendant when he was a Mountain View police officer.

Evidence Code section 832.7 defines as a "personnel record" materials which include "(d) Employee advancement, appraisal, or discipline," and "(e) Complaints, or investigations of complaints, concerning an event or transaction in which he or she participated, or which he or she perceived, and pertaining to the manner in which he or she performed his or her duties."

While peace officer records ordinarily are privileged from disclosure under Evidence Code section 832.7, it is questionable whether the bulk of information presented in this case regarding the 1967 shooting incident in question was covered under that section, given it concerned testimony of percipient witnesses and at least one of the witnesses was no longer a police officer, was no longer connected with the police department, and had volunteered the information to the district attorney investigator. Furthermore, at sentencing, apparently after "some in chambers discussions . . . with respect to [the personnel report card]," but prior to the trial court's formal ruling

admitting that card into evidence and prior to the testimony of retired Captain **Jerry** Fairwell, defendant offered a newspaper article into evidence which concerned the 1967 shooting. The article was offered "in response to the probation report" because it allegedly described defendant's "lack of culpability in that shooting and how [the chief of police] viewed [defendant]."[15]

In any event, assuming arguendo the challenged personnel report card and the oral testimony regarding the disciplinary proceedings against defendant which flowed from the 1967 shooting were improperly considered by the trial court, we are convinced any such error was harmless because it is not reasonably probable consideration of the challenged evidence affected the trial court's selection of the middle term in this case. (*People v. Clark, supra,* 50 Cal.3d at p. 638, fn. 38; *People v. Harris, supra,* 226 Cal.App.3d at p. 147; *People v. Watson, supra,* 46 Cal.2d at p. 836; Cal. Const., art. VI, § 13.) At sentencing, Gilbert's family made an impassioned plea to sentence defendant to the maximum prison term allowed by law. Both the defendant and victim Gilbert had numerous witnesses who testified on their behalves at sentencing in

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[15] *City of San Diego v. Superior Court* (1981) 136 Cal.App.3d 236, 239, upon which defendant relies, is distinguishable as the officers in that case were subpoenaed to testify concerning their own conduct after a *Pitchess* motion was partly denied. We believe that, had other officers been willing to voluntarily come forth and discuss their experiences, the trial court should not have prevented them from doing so to the extent they were testifying to information not normally included in personnel files.

this case. For example, several defense witnesses presented evidence that defendant was not a racist in his dealings with the public or with fellow police officers or firefighters, that he would not present a threat to the general public, that his "style" is "to help people" and that he unselfishly has assisted in police actions both on and off-duty and thereby helped save others, including Black individuals, from injury. On the other hand, the prosecution called witnesses apart from retired captain Fairfield who testified regarding defendant's prior record, including a witness who described a disciplinary matter involving defendant in 1994 based upon defendant's failure "to follow rules and regulations of the San Jose Fire Department" by refusing to respond to a dispatch. Furthermore, as noted above, retired captain Fairfield testified to several other incidents apart from the 1967 shooting which concerned negative aspects of defendant's character and his career as a police officer, and defendant correctly does not claim evidence concerning any of those other incidents was inadmissible given he placed his police service record at issue as a major part of his sentencing strategy.

Moreover, the arguments for and against finding unusual circumstances focused on several issues beyond the challenged evidence regarding defendant's prior police record. The defense conceded it was "not saying that [defendant] is eligible for probation because he was a police officer, or because he was a public servant for 27 or 30 years, or because he's a good guy." Rather, the defense explained that the main thrust of their argument was that defendant's "use of a firearm, while technically present, is not fully applicable or [is] less serious than an ordinary

case" and that this was a case "involving great provocation." On the other hand, in arguing defendant should be considered ineligible for probation, the prosecutor argued defendant held onto his gun for over a year after he had killed someone with it and did not. sell it until defendant's trial counsel was told the probation officer would ask for a search warrant to obtain the gun if defendant did not get rid of it, that defendant was the only San Jose fire captain since 1980 who had been disciplined for refusing to go out on a dispatch, that defendant committed a crime every time he drove around with his loaded concealed weapon in his car given he had no permit for the gun, and that, in general, defendant repeatedly "makes bad decisions" and "makes his own rules." With regard to the facts of the present case, the prosecutor argued defendant could not establish by a preponderance of evidence the unusual circumstances which would warrant a consideration of probation because he had "escalated the violence by going to get [his] gun" which he was "illegally carrying."

Most important, the record establishes that the trial court found the statutory limitation on probation had not been overcome based upon a number of factors, not just the information from the challenged personnel records; it specifically mentioned that, in making its determination that this was not an unusual case in which the interest of justice would be best served by granting probation, it had considered California Rules of Court "rule 413 (c)(1) and (c)(2) with the evidence presented at trial, together with the probation report, evidence presented at the sentencing hearing and the respective points and authorities submitted by the parties and oral argument vis-a-vis

sentencing." It is also significant that, after determining it would not consider the criteria as set forth in the Rules of Court rule 414 to decide whether to grant probation, the court noted that "this is a case of strong contradictions and of human frailty" and then described defendant as "a man dedicated by profession to the high-risk task of public safety" in contrast to the victim, who, though a working man, was "involved in criminal activity" on the day in question. The court went on to say that, in "assessing that loss with the measure of the sentence it [would] impose," it found that "the circumstances as to either mitigation or aggravation do not outweigh one or another" and that therefore it would "select the midterm of three years" as the term to impose as to the involuntary manslaughter conviction. Given the trial court's overall comments, which were based upon a multitude of criteria apart from the challenged evidence brought forth during the sentencing hearing, and given the court's imposition of the midterm as opposed to the mitigated term in this case, we are convinced it was not reasonably probable that, had the challenged evidence been excluded from the sentencing hearing, the trial court would have found the statutory limitation on probation had been overcome or, in turn, that probation should have been granted under the criteria as set forth in California Rules of Court rule 414. Accordingly, we conclude that any error in admission of the challenged evidence was harmless.

## DISPOSITION

The judgment is affirmed.

Cottle, P. J.

WE CONCUR:

Premo, J.

Elia, J.

*People v. Gremminger H018156*

[PROOF OF SERVICE OMITTED IN PRINTING]

IN THE SUPREME COURT OF CALIFORNIA

EN BANC

THE PEOPLE, Respondent

v.

ROBERT GREMMINGER,
Appellant

(Filed March 21, 2001)

Appellant's petition for review denied.

George
Chief Justice